Payroll tax and employment agency contracts

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On 13 December 2023, the NSW Court of Appeal (comprised of Ward P, Payne JA and Basten AJA) handed down the decision *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302. The decision focuses on the application of the employment agent provisions in the *Payroll Tax Act 2007* (NSW).

As the first Court of Appeal decision to consider the application of the *UNSW Global* 'in and for' test in detail, it is an important case for payroll tax practitioners to be familiar with.

Background

This article follows from our article published on 15 December 2023 about the key developments in 2023 in relation to the payroll tax treatment of payments to contractors. In that article we provide some background to the employment agent provisions, the *UNSW Global* 'in and for' test and the first instance decision, *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557.

Before turning to the *Integrated Trolley Management* appeal decision, below we briefly repeat the critical background points.

The employment agent provisions are engaged where there is an 'employment agency contract' as defined. This requires there to be a contract under which a person procures the services of another person 'for a client'. In 2016, in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2016) 104 ATR 577, White J concluded that the words 'for a client' should be read as 'in and for the conduct of the business of the client' (at [62]) (often called the 'in and for' test).

The *Integrated Trolley Management* decisions concern payments from Integrated Trolley Management Pty Ltd (**ITM**) to contractors to perform trolley collection and cleaning services under contracts it has with Woolworths, ALDI and IGA. At first instance, Parker J found that those payments were not captured by the employment agent provisions (and therefore, not subject to payroll tax). The NSW Court of Appeal has allowed the Chief Commissioner's appeal to Parker J's decision.

The appeal decision

Basten AJA gave the leading judgment with Ward P and Payne JA each agreeing with his Honour's reasoning (and providing their own additional reasons).

The following key points can be gleaned from Basten AJA's judgment regarding the definition of employment agency contract and the 'in and for' test:

- The contract to examine in identifying an employment agency contract is the one between the putative employment agent and the client (rather than the contract between the putative employment agent and the service provider) (see [27]-[39]). Basten AJA rejected Parker J's position that the subject contract is that with the service provider.

- The focus is on an objective analysis of the contract. The actual operation of the agreement provides little guidance as to its characterisation (see [111]). In most cases, a fact-sensitive analysis, going beyond an analysis of the contractual arrangements and the nature of the client's business, is not necessary (see [112]).

- The 'in and for' test requires the identification of: (i) the work to be done by persons who provide the services to a client; and (ii) the nature and ordinary conduct of the client's business (see [49]). It is the relationship between these two matters which determines the application of the definition of employment agency contract.

- In considering this relationship, a potentially valuable inquiry is whether the client might conduct its business by directly employing the individuals and whether those individuals work in much the same way as they would if they were employees of the client. This involves a comparison to a hypothetical scenario where the client directly employs the individuals including consideration of the degree of control which would be exercised, whether employees would be maintained on a regular and continuous basis and whether the nature of the services would be different (see [86]-[91]). Below we refer to this analysis as the **Hypothetical Employee Comparison**.

- Indicia considered in previous cases will rarely be of assistance to the analysis and the language used by judges in applying the test '*cannot, and should not, be relied upon as establishing a legal principle*' (see [40]-[54] and [113]).

Basten AJA and Payne JA each separately considered several indicia raised by the parties regarding the 'in and for' test (see [63]-[85] and [96]-[101] (Basten AJA) and [14] (Payne JA)). Ward P did the same by reference to the factors listed by Payne JA (see [5]).

Below we comment on three of the more contentious indicia considered.

Control

Payne JA found that Woolworths, via its contract with ITM, exercises reasonably close control over the activities of trolley collection workers. His Honour said that this pointed to the services being supplied in and for the conduct of the business of Woolworths (see [12] and [14(6)-(7)]).

Basten AJA mentioned that the contract '*made ITM liable for compliance by service providers with … directions given by Woolworths' representatives*' (at [85]). His Honour then considered the Hypothetical Employee Comparison and concluded that '[h]*ad such a test been applied in the present case, a high level of similarity between the situations should have been accepted, given the proper construction of the agreement between ITM and its clients*' (at [91]).

Notwithstanding the warnings that indicia used in previous cases will rarely assist future applications of the 'in and for' test, it appears that a contractual right of control by a client

over service providers (under the contract between the client and putative employment agent) may often be a strong indicator that the service providers are working in and for the conduct of the client's business in the context of the Hypothetical Employee Comparison. This is because a contractual right of control is a hallmark of an employer-employee relationship and therefore, a client's contractual right of control over service providers suggests that the service providers are working in much the same way as employees would be.

Working for multiple stores simultaneously

There was evidence given that some of the trolley collectors simultaneously worked for more than one store at the same shopping centre.

Payne JA rejected this factor as being persuasive to his consideration given the limited evidence (at [14(9)]). Basten AJA also took issue with the lack of detail in the evidence and any finding based on it (see [63]-[68]).

Significantly, Ward P hesitated in reaching her conclusion principally because of this factor (without explaining the basis of her Honour's hesitation), although, her Honour accepted that there was limited evidence on the issue (see [5]).

When this factor is considered under the Hypothetical Employee Comparison, it can be seen how it might have supported ITM's contentions (if better evidence was given). If Woolworths employed trolley collectors directly, would it permit the trolley collectors to simultaneously work for its competitors? If not, this might demonstrate that the trolley collectors (at least those that simultaneously work for other stores at the same location) do not work in much the same way as they would if they were employees of Woolworths.

Uniforms

The trolley collectors wear ITM branded uniforms or in some cases a sticker saying 'visitor'.

Contrary to previous cases that have found uniform branding to be important to this analysis (e.g. *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue* (2019) 109 ATR 879), Basten AJA and Payne JA both found that this factor is not relevant (at [14(2)] and [97]-[98]). Both their Honours' reasoning focuses on their findings that customer perceptions about the identity of an employer is unlikely to cast light on the statutory question.

However, it can again be seen how this factor may be relevant (in some circumstances) in the Hypothetical Employee Comparison. If, in the hypothetical scenario where the client directly employs the service providers, the client would require the service providers to wear uniforms with its own branding (but under the actual arrangements, the service provider does not wear client-branded uniforms), this may assist in demonstrating that the service providers do not work in the same way as they would if they were employees.

Concluding remarks

As at the time of writing, ITM has not appealed the decision to the High Court and the ordinary 28 day appeal time limit has elapsed (on 10 January 2024). Accordingly, this decision should stand as the leading authority on the application of the 'in and for' test for the immediate future (unless the High Court dispenses with the 28 day time limit).

The decision will be useful to practitioners by providing authoritative guidelines regarding the application of the 'in and for' test (refer to the bullet points above). However, the test remains complex to apply and the case law will no doubt continue to evolve as further cases consider the 'in and for' test in light of this appeal decision.